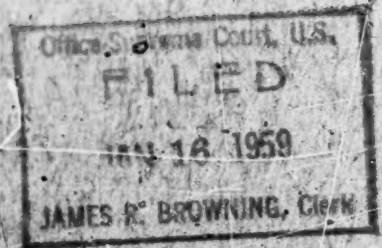


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**No. 66**

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1958**

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**SAN DIEGO BUILDING TRADES COUNCIL, MILWAUKEE'S  
UNION, LOCAL 2020, BUILDING MATERIAL AND DUMP  
DRIVERS, LOCAL 36, PETITIONERS**

**v.**

**J. S. GARMON, J. M. GARMON, AND W. A. GARMON**

---

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF CALIFORNIA**

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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**J. LEE BANKIN,**

*Solicitor General,*

*Department of Justice, Washington 25, D.C.*

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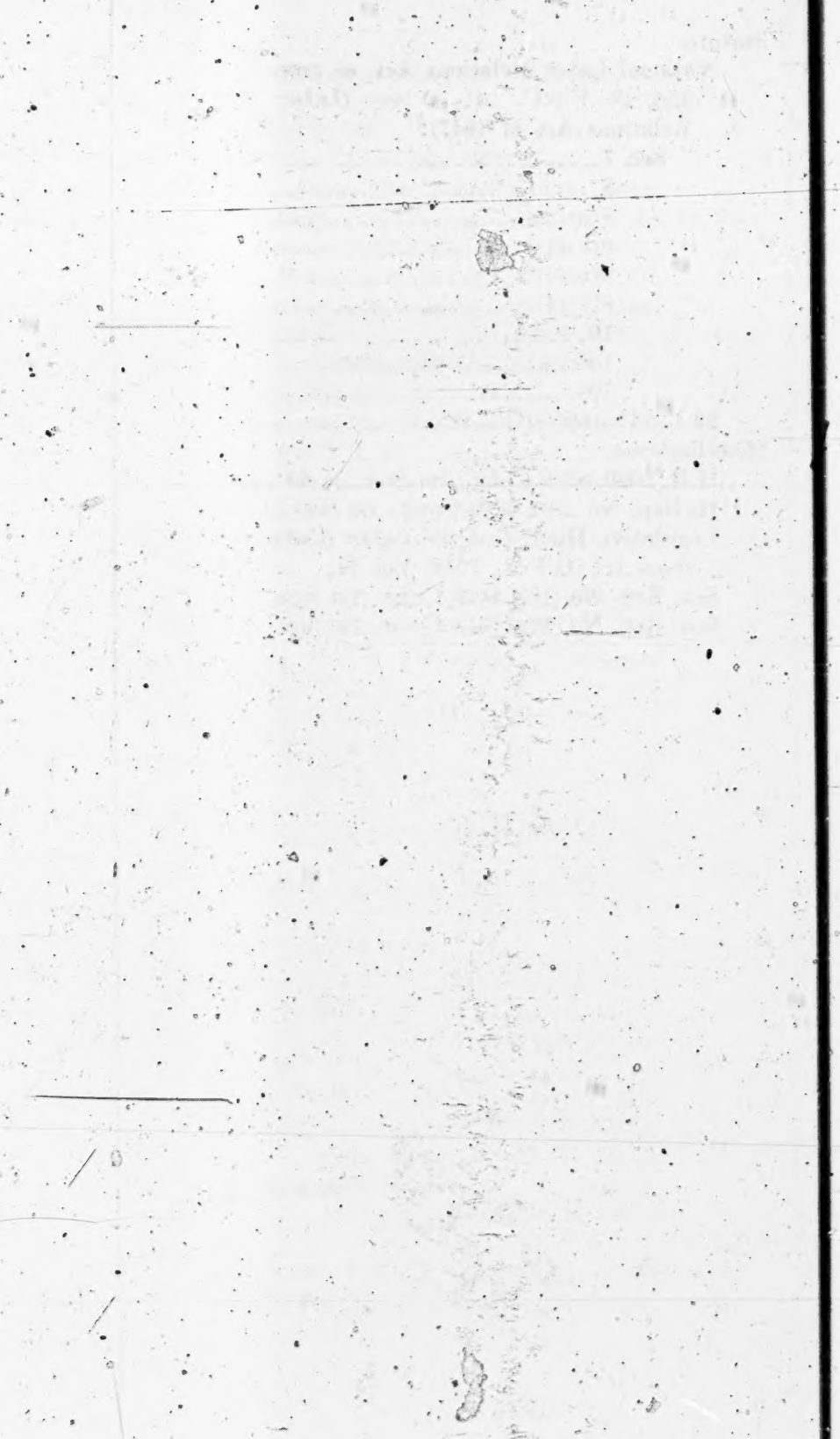
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# **In the Supreme Court of the United States**

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

---

This brief is submitted pursuant to the Court's order of October 13, 1958, inviting the Solicitor General to file a brief in this case setting forth the views of the United States. 358 U.S. 801.

## **QUESTION PRESENTED**

The question presented is whether a state court may award damages to redress economic injury resulting from non-violent labor activities in support of objectives violating state law where such labor activities, which are probably also in violation of the National Labor Relations Act (as/amended), are precluded by the Act from being enjoined by a state court.

## STATEMENT

1. *The underlying facts.*—J. S. Garmon, J. M. Garmon and W. A. Garmon, herein collectively called Garmon, constitute a partnership doing business as the Valley Lumber Company in the County of San Diego, California, where they operate two lumber yards and sell lumber and building materials at retail (R. 325; 82). Garmon's employees are not members of petitioners ("the Union"), and the Union has not been certified, designated, or recognized as bargaining representative of the employees (R. 325; 83, 121, 122-123). Nevertheless, on or about November 15, 1952, the Union demanded that Garmon enter into a collective bargaining agreement with it requiring, *inter alia*, that its employees after an appropriate waiting period become and remain members in good standing of the Union as a condition of their employment (R. 325; 2, 9, 83-86). Garmon refused to sign such an agreement unless and until a majority of the employees designated the Union as their bargaining representative (R. 325-326; 83-86). Thereupon, the Union instituted peaceful picketing to enforce its demand for execution of the agreement (R. 326; 87). In addition to picketing, Union agents followed Garmon's trucks and threatened persons doing business with Garmon with economic injury (R. 326; 88-89, 124, 180).

As found by the Supreme Court of California, the facts were as follows (R. 325-326):

As to the facts it appears that the plaintiffs are partners engaged in interstate commerce as retail dealers in lumber and other building

materials; that their employees are not members of a labor union and had indicated that they do not desire to join, or to be represented by, a union; that the defendant unions had not been recognized by the plaintiffs nor certified by the National Labor Relations Board as the representatives of the plaintiffs' employees; that nevertheless the defendants demanded that the plaintiffs enter into an agreement which would require that all of the plaintiffs' employees be or become members of the defendant unions; that upon the plaintiffs' refusal to enter into such an agreement, on the ground that to do so would violate the law, the defendants placed pickets at the plaintiffs' place of business, had the plaintiffs' trucks followed, threatened persons about to enter the plaintiffs' place of business with economic interference and injury, and that by such conduct they induced building contractors to discontinue their patronage.

\* \* \* The court found on substantial evidence that the intent of the defendants was not to induce the employees to join one of their unions, nor to provide education or information as to the benefits of organized representation; that their only purpose was to compel the plaintiffs to execute the agreement or to suffer the destruction of their business. \* \* \*

2. *The proceedings for damages and injunctive relief.*—On May 7, 1953, about a week after the picketing began, Garmon filed suit in the Superior Court for San Diego, California, requesting damages and an injunction against the picketing. The complaint alleged that Garmon's operations affected interstate commerce

and that the contract sought by the Union would violate the National Labor Relations Act (R. 1-5). The Union contested the court's jurisdiction, claiming that the National Labor Relations Board had exclusive jurisdiction and that Garmon had not exhausted its administrative remedies under the federal Act (R. 5-12). On July 30, 1953, the Superior Court after hearing issued its findings of fact and conclusions of law (R. 12-17). In sum, the court found that, although Garmon's operations affected interstate commerce, the National Labor Relations Board had declined, pursuant to its policy standards, to assert jurisdiction over Garmon; that the Union's picketing was improper under the National Labor Relations Act; and that the court had jurisdiction to grant relief. Accordingly, the court granted an injunction against the picketing and secondary activity, and in addition awarded a damage judgment against the union in the amount of \$1,000 (R. 24-25).

On appeal by the Union, the District Court of Appeal for the Fourth District of California reversed (R. 30-42). It held that the National Labor Relations Board had exclusive jurisdiction over the dispute, that Garmon had not exhausted its administrative remedy before the Board, and that the Union's conduct was not unlawful under California law.

Garmon then appealed to the California Supreme Court. That court concluded, by a divided vote, that the Superior Court had jurisdiction, inasmuch as the Board by declining jurisdiction had removed the possibility of a conflict between state and federal remedies (R. 49-50). The California Supreme Court fur-

ther concluded that the Union's picketing was violative of the federal statute and was therefore not privileged under state law (R. 52). Accordingly, the judgment of the trial court was affirmed both with respect to the damage award and the injunction (R. 53).

The case was then brought to this Court by certiorari, and the judgment of the California Supreme Court was vacated. *San Diego Building Trades Council v. Garmon*, 353 U.S. 26. The decision of this Court was handed down at the same time as, and in reliance upon, the decisions in *Guss v. Utah Labor Relations Board*, 353 U.S. 1, and *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*, 353 U.S. 20. The Court there determined that a state court lacks authority to grant injunctive relief against unfair labor practice conduct even in situations, as here, where the National Board declines to exercise its jurisdiction because of its jurisdictional standards. 353 U.S. at 9-11. The Court added in the instant case (353 U.S. at p. 29):

Respondents, however, argue that the award of damages must be sustained under *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656. We do not reach this question. The California Supreme Court leaves us in doubt, but its opinion indicates that it felt bound to "apply" or in some sense follow federal law in this case. There is, of course, no such compulsion. Laburnum sustained an award of damages under state tort law for violent conduct. We cannot know that the California court would have interpreted its own state law to allow an award of damages in this

different situation. We therefore vacate the judgment and remand the case to the Supreme Court of California for proceedings not inconsistent with this opinion and the opinions in *Guss v. Utah Labor Relations Board, supra*, and *Amalgamated Meat Cutters v. Fairlawn Meats, Inc., supra*.

3. *The decision below.*—Upon remand, the court below, again in a split decision, affirmed the trial court's judgment insofar as it awarded damages to Garmon (R. 343). Addressing itself first to the circumstance that the conduct on which the award was based constituted an unfair labor practice under the federal Act, the court concluded that state "courts are not foreclosed from asserting jurisdiction in an action for damages resulting from the tortious conduct of those engaged in [a labor] dispute" (R. 330). This conclusion was premised upon this Court's decision in *Laburnum, supra*, and also upon the remand order of this Court in this case, from which the court below inferred an acknowledgment of state authority to award damages in the circumstances of this case (R. 330-333). Turning then to the lawfulness of the Union's picketing under California law, the court determined that the Union's objective—recognition and a union security contract at a time when it had not been designated by a majority of Garmon's employees as their bargaining agent—was contrary to the organizational rights enjoyed by Garmon's employees under the California Labor Code (R. 334-336). Accordingly, the court concluded that by picketing for such an objective the Union had engaged in "an unlawful labor practice contrary to and in violation of the laws

of this state," for which damages could properly be awarded (R. 337, 343).

## DISCUSSION

### INTRODUCTION

The Court's determination in its original decision in this case (353 U.S. 26) that the California courts are precluded by the federal Act from enjoining the Union's picketing follows the rule first laid down in *Garner v. Teamsters*, 346 U.S. 485. Here, as in *Garner*, the Union (on the facts found below) sought by non-violent picketing to compel an employer to sign a union security agreement which does not satisfy the conditions prescribed by the Act. Picketing in furtherance of that purpose is, in general, subject to restraint by the National Labor Relations Board under the Act. As this Court noted in the first *Garmon* case, Section 8(a)(3) of the Act "allows an employer to enter into a union security agreement of the type petitioners here were seeking only if the union is the bargaining representative of his employees." 353 U.S. 27, n. 1. Section 8(b)(2) of the Act, in turn, subject to qualifications not material here, prohibits a union from causing or attempting to cause an employer to discriminate against employees on account of their membership or non-membership in a labor organization. As noted in *Garner*, 346 U.S. at 488-489, picketing to compel the execution of a union security contract by a union which does not represent a majority of the employees involved falls within the ban of this provision. The purpose of Section 8(b)(2) is to protect the employees in the exercise

of Section 7 rights and not the employer's business from loss occasioned by unlawful union activity. The decision in *Garner* establishes that prevention of such conduct by injunction is for the Board alone, in order that there will be no conflict with the remedial orders to which an infringing union is subject under the Act. *Garner*, 346 U.S. at 498-499.

The damage remedy awarded by the court below, however, unlike the injunction issued by the state court in *Garner*, is not available under the federal Act. The remedial provision of the Act, Section 10(c), authorizes the Board to issue cease and desist orders, "and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act \* \* \*." Money damages to compensate an employer for private business losses, the basis of the award sustained by the court below, are not within the reach of Section 10(c)'s purpose of vindicating the employee rights established in the Act. *United Construction Workers v. Laburnum Corp.*, 347 U.S. 656, 663-665; cf. *Virginia Electric Co. v. National Labor Relations Board*, 319 U.S. 533, 543.

Whether the remedial action of the state court in this case falls within the area which the federal statute nevertheless preempts is a matter not explicitly dealt with in the provisions of the federal Act. Federal statutory regulation "leaves much to the states, though Congress has refrained from telling us how much." *Garner*, 346 U.S. at 488. The specific question in this case, however, need not be resolved solely in terms of the Act and the implications to be drawn

therefrom. For in the numerous decisions of this Court which treat the problem of federal preemption, and more specifically the question of state authority to award damages for unfair labor conduct, "The statutory implications concerning what has been taken from the States and what has been left to them" have to a considerable extent been "translated into concreteness by the process of litigating elucidation." *Int'l Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 619.

This Court's prior decisions teach that there are five general areas in which the problem of preemption arises with respect to suits against unions:—(1) the area of labor activities protected by Section 7 of the federal Act; (2) the area of labor activities prohibited by Sections 8 and 10 of the Act, and subject to control by the National Labor Relations Board; (3) the area of labor activities which directly involves concerted activities but which are neither "protected" nor "prohibited" by the Act; (4) the area of labor activities substantially involving violence and like improper coercion;<sup>1</sup> and (5) the area of labor activities remote from, or peripheral to, the collective activities with which the federal Act deals.

1. As for the first class, it is undisputed that Section 7 of the Act creates substantive federal rights, and that the states must respect these federal rights and cannot attach any sanction to conduct so authorized. *Hill v. Florida*, 325 U.S. 538; *Int'l Union, UAW v. O'Brien*, 339 U.S. 454; *Amalgamated Ass'n v. Wisconsin Board*, 340 U.S. 383.

<sup>1</sup> This fourth category is not exclusive but overlaps the second, third, and fifth classes.

2. With respect to activities prohibited by Sections 8 and 10 of the Act, this Court has repeatedly held that preventive relief (e.g., by injunction) cannot be given by the states against conduct which is, or might well be, an unfair labor practice under the federal law, regardless of whether or not the Labor Board has acted in the dispute. *Garner v. Teamsters Union*, 346 U.S. 485; *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468; *Building Trades Council v. Kinard Constr. Co.*, 346 U.S. 933; *Pocatello Building & Constr. Trades Council v. C. H. Elle Constr. Co.*, 352 U.S. 884; *Retail Clerks Int'l Ass'n v. J. J. Newberry Co.*, 352 U.S. 987; *Teamsters Local 327 v. Kerrigan Iron Works, Inc.*, 353 U.S. 968; *District Lodge 34, Int'l Ass'n of Machinists v. L. P. Cavett Co.*, 355 U.S. 39; *Local 25, Teamsters Union v. New York, N.H. & H. R. Co.*, 350 U.S. 155, 161; *Guss v. Utah Labor Board*, 353 U.S. 1, 6; *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*, 358 U.S. 20, 23; *San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26, 28; *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131, 137-139. Cf. *Capital Service, Inc. v. National Labor Relations Board*, 347 U.S. 501 (certiorari limited to question assuming applicability of rule); *Amalgamated Clothing Workers v. Richmond Brothers Co.*, 348 U.S. 511 (assuming applicability of rule but denying federal court injunction of state proceedings).

The Court has not yet applied this rule to damage actions, but the Court's theory, as announced in *Garner* and followed in the later cases—that the federal Act has occupied the field and therefore does not permit remedies to be provided by the states for conduct

which is an unfair labor practice under federal law—may apply here as well. On the other hand, the distinct remedy of damages, unavailable under the federal Act, may call for a different conclusion. Whether the difference in remedies calls for a difference in result with respect to preemption is the precise problem in the present case.

3. The third area of labor relations involves concerted activities which are neither protected by the federal Act (under Section 7) nor specifically prohibited by it (Sections 8 and 10). This problem, too, has not yet been resolved by this Court. On the one hand, it can be argued that this area has been left by Congress for private handling and resolution—as an aid to industrial peace through mutual agreement. Under this view, neither the Federal Government (via the Labor Board) nor the states will intervene by imposing sanctions or taking official action against one side to the dispute or the other; the resolution of the controversy is to be left to the processes of collective bargaining, of mutual accommodation and mutual friction, of counterbalancing economic forces.<sup>2</sup>

The opposing view is that in this area Congress has left the states free to act since no positive collision with federal regulation is involved, and that the award of damages by state courts for union conduct in this area does not impair or interfere with the statutory scheme established by Congress.

4. However, in one area up to now the Court has clearly negated preemption—whether the conduct falls within the prohibited category or in the middle

<sup>2</sup> See *infra*, p. 37.

area left untouched by the direct provisions of the federal Act. Where violence or comparable improper coercive conduct is the core of the union's activity, state intervention has been allowed. This has been true both of damage actions and of proceedings for preventive relief. *Auto. Workers v. Wisconsin Board*, 336 U.S. 245; *United Construction Workers v. Laburnum Constr. Corp.*, 347 U.S. 656; *Auto Workers v. Wisconsin Board*, 351 U.S. 266, 273-274; *Automobile Workers v. Russell*, 356 U.S. 634; see *San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26, 28. "The dominant interest of the State in preventing violence and property damage cannot be questioned. It is a matter of genuine local concern." *Auto Workers v. Wisconsin Board*, 351 U.S. at 274.

5. In addition, the Court has not found preemption where the gist of the state proceeding is "too remotely related to the public interest expressed in the Taft-Hartley Act." *Int'l Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 621 (breach of contract action by union worker for expulsion from union). In those cases, too, there is no preemption because the federal Act has not purported or attempted to occupy the particular field.

The present case appears to fall either into the second or the third class—either the union's conduct is an unfair labor practice under the federal Act or it is in the middle area of concerted activities neither protected nor prohibited by the Act.<sup>3</sup> It is very probable that the conduct is a federal unfair labor

<sup>3</sup> Under *Guss v. Utah Labor Relations Board*, 353 U.S. 1, it makes no difference that the National Labor Relations Board may decline jurisdiction in this particular case.

practice. *Infra*, pp. 23-24. For that reason, the union activities here are not enjoined by a state court; and to that extent, at least, the federal Act precludes state action. *Hotel Employees Union, Local No. 255 et al. v. Sax Enterprises, Inc., et al.*, Nos. 5 and 6, this Term, decided January 12, 1959.

The exact question here, to which we now turn, is whether the federal Act likewise precludes state action taking the form of a judicial award of damages only. In order to present the case as objectively as possible, we shall state in Part A the arguments supporting the exercise of state jurisdiction here involved, and in Part B the opposing arguments supporting federal preemption.

#### A. THE CASE FOR STATE JURISDICTION

Preclusion of state adjudication in the field of labor relations in deference to federal jurisdiction under the Labor Management Relation Act of 1947 has been premised upon the principle that Congress intended a uniform and specialized treatment of controversies which fall within the purview of the Act. As summarized by this Court in *Garner* (346 U.S. 485, 490-491):

Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies \* \* \* A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or

conflicting adjudications as are different rules of substantive law.

Accordingly, here, as in *Garner*, assertion of state authority to prevent unfair labor practice conduct by an order restraining its continuance, has been invalidated.<sup>4</sup> The potential conflict in remedies, where both state and federal tribunals seek to regulate the identical conduct by injunction, renders concurrent jurisdiction destructive of the Congressional purpose of uniformity. See *Garner*, 346 U.S. at 498-499.

1. The same result, however, need not be reached in cases involving, as does this case, a state remedy which differs radically from that available under the federal Act. On three occasions the Court has upheld the validity of a state damage judgment, the same remedy awarded by the court below in this case, to redress an employer's economic loss attributable to a union's unfair labor practice activity. On each of these occasions, the Court has rejected the contention that the underlying principle of federal preemption in this field required state abstention merely because the Board was enabled, within the prescribed area of its remedial authority, to deal in some way with the same subject matter. The possibility that state and federal tribunals could look at the same conduct differently, which might make preclusion of state jurisdic-

<sup>4</sup> See also, *Weber v. Anheuser-Busch*, 348 U.S. 468, *Local 25, Teamsters Union v. New York, N.H. & H. R. Co.*, 350 U.S. 155; *Bldg. Trades Council et al. v. Kinard Construction Co.*, 346 U.S. 933; *Plankinton Packing Co. v. Wisconsin Employment Relations Board*, 338 U.S. 953; *Hotel Employees Union, Local No. 255, et al. v. Sax Enterprises, Inc., et al.*, Nos. 5 and 6, *Teamsters Union v. New York, N.H. & H. R. Co.*, 350 U.S. 155; *supra*, p.10.

tion "abstractly justifiable, as a matter of wooden logic" (*Int'l Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 619), has not been accepted as the controlling criterion for attainment of the desired accommodation of state and national interests in the labor relations field where the state has a separate and distinguishable purpose from that of the Board and where it uses the different remedy of damages.

In *United Construction Workers v. Laburnum*, 347 U.S. 656, an employer was permitted to recover in a state court actual and punitive damages resulting from union organizational activities which were enjoinable by the Board under Section 8(b)(1)(A) of the federal Act. Although the union's activity in that case involved violence, this consideration was not regarded as the controlling factor in the decision—as is indicated by the following résumé of the facts and analysis of the reasoning and result:

Laburnum was engaged in performing construction work for a coal company under cost-plus-5% contracts. At the time of the incidents involved, it had substantially completed three projects, had been given contracts for two more on which work had not yet commenced, and had been promised but not yet awarded a contract for a sixth. As a result of the activities of the defendant union, an affiliate of the United Mine Workers, the coal company cancelled the existing contracts and refused to award the sixth to Laburnum. Laburnum sued the union in a Virginia state court for damages for the loss of the profits it would have made under these contracts (some \$700 for the work remaining on the partially-completed con-

tracts; \$1500 on the contracts awarded but not commenced; and \$27,000 on the sixth contract promised but not awarded). The evidence on the nature of the union's activities was conflicting, the union contending that it had simply peacefully picketed the construction site in an attempt to organize Laburnum's unorganized employees. The jury found for Laburnum. The Supreme Court of Appeals of Virginia, taking as the facts the evidence most favorable to Laburnum, affirmed a judgment for compensatory damages in the above amounts and for punitive damages in the amount of \$100,000 (194 Va. 872).

The facts found by the Virginia courts were that, although none of Laburnum's employees belonged to the UMW, the UMW demanded that it be recognized as the bargaining representative and that hiring be done through it. Upon Laburnum's refusal to comply with the demand, a large mob, by threats of violence, caused the employees to stop work and sought to coerce them to join the union. Thereafter, the employees refused to cross the union's "picket line" to return to work for fear of violence. The union also threatened, if Laburnum continued the work without recognizing the UMW, to cause its members employed by the coal company to strike. About a week after this interruption of the work, the coal company, having "become alarmed lest the disturbance spread to their own employees who were members of the United Mine Workers and bring on a stoppage of their mining operations," cancelled the contracts then in progress (194 Va. at 884). It later also refused to give Laburnum the additional contract it

had promised it, explaining that it "could not run the risk of having the [UMW] \* \* \* shut down the mining operations because of the unions' differences with Laburnum" (194 Va. at 885).

This Court affirmed the state courts' award of damages. It said (347 U.S. at 665):

To the extent that Congress prescribed preventive procedure against unfair labor practices, that case [*Garner*] recognized that the Act excluded conflicting state procedure to the same end. To the extent, however, that Congress had not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated. The care we took in the *Garner* case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived. The primarily private nature of claims for damages under state law also distinguishes them in a measure from the public nature of the regulation of future labor relations under federal law.

The Court further noted that Section 303 of the federal Act had expressly created a federal right of action for damages resulting from secondary boycotts, and that (p. 666):

\* \* \* it is not consistent to say that Congress, in that section, authorizes court action for the recovery of damages caused by tortious conduct related to secondary boycotts and yet, without express mention of it, Congress abol-

ishes all common-law rights to recover damages caused more directly and flagrantly through such conduct as is before us.

The Court found this result to be consistent with the purposes of the 1947 Act. It observed that there was no doubt of a union's liability for damages for tortious conduct before that Act, and pointed out that that Act could hardly be construed as intended to create such an immunity (pp. 666-667):

The 1947 Act has increased, rather than decreased, the legal responsibilities of labor organizations. Certainly that Act did not expressly relieve labor organizations from liability for unlawful conduct. It sought primarily to empower a federal regulatory body, through administrative procedure, to forestall unfair labor practices by anyone in circumstances affecting interstate commerce. The fact that it prescribed new preventive procedure against unfair labor practices on the part of labor organizations was an additional recognition of congressional disapproval of such practices. Such an express recognition is consistent with an increased insistence upon the liability of such organizations for tortious conduct and inconsistent with their immunization from liability for damages caused by their tortious practices.

In answer to the claim that *Laburnum* rested on the presence of violence, it should be noted that the Court's reasoning is nowhere qualified by reference to violence. Violence is mentioned only in the statement of the facts and in a passage quoted from the Act's legislative history (347 U.S. at 658-660, 668). The opinion repeatedly refers throughout, in general

terms, to "a common-law tort action for damages", "traditional state court procedure for collecting damages for injuries caused by tortious conduct", "common-law rights", "tortious conduct", "common-law liabilities" (347 U.S. at 657, 658, 663, 664, 665, 666, 667).<sup>5</sup>

Moreover, it is not at all clear that the judgment could have been sustained solely on the ground of violence. While a state action to recover damages for physical injuries to person or property resulting from violence would clearly lie, it is not so plain that an employer would be entitled to recover for loss of profits caused by labor activities simply because some of that controversy was tainted by violence. The violence was directed toward the employees, and the employer's injury was only the indirect consequence of its employees' refusal to continue work, an injury that would have been the same whether the refusal was induced by threats of violence or, as the union in fact claimed, by a peaceful picket line. More troublesome is the fact that almost all of the compensatory damage award was for the loss of the profits, not on the work in fact interrupted, but on the contract which had been promised to Laburnum but which was later withdrawn by the coal company. The relationship of the violence to that loss was remote. The sole reason

<sup>5</sup> If violence had been the basis for the decision, it would have been unnecessary to distinguish *Garner* which itself recognized the power of the states to enjoin violent conduct; nor would there have been any need to distinguish, in a case involving violence, between the power of states to grant injunctions and their power to award damages. It would have been enough to say that, where violence existed, the states had both powers.

given by the company for not awarding that contract to Laburnum was its fear that the union would close down its mines by a strike of the mineworkers. Indeed, the very fact that Laburnum continued to seek that contract can be said to show that it was *not* deterred by the threat of violence. Thus, that loss would seem to have been more directly caused by the threatened "secondary boycott" than by the violence or threatened violence.

The reasoning of the *Laburnum* case has recently been applied in *Automobile Workers v. Russell*, 356 U.S. 634, and to some extent in *Int'l Ass'n of Machinists v. Gonzales*, 356 U.S. 617. In *Gonzales*, the Court upheld an award of damages for loss of wages resulting from a union's allegedly wrongful expulsion of an employee from membership, and its subsequent refusal to permit him access to its hiring hall which provided the sole means of obtaining employment with firms under contract with the union. Although the Board may award back pay for the union's discrimination with respect to the denial of job opportunities in this kind of situation, here again that authority was held not to "deprive a party of available state remedies for all damages suffered." 356 U.S. at 621.\* Although *Gonzales* involved a matter—intra-union activities—only remotely related to the sphere of the Taft-Hartley Act

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\* It may also be noted that, shortly after the decision in *Gonzales*, the Court denied certiorari in *Teamsters v. Selles*, 356 U.S. 975, a case like *Gonzales* in all respects except that the employee who recovered damages for loss of wages attributable to the union's discrimination was not expelled from the union. Hence, as here, but unlike *Gonzales*, that case offered no basis for state court jurisdiction apart from the unfair labor practice claim.

(*supra*, p. 12), the Court's reasoning and conclusion do have a bearing on the present problem.

*Russell* is much more directly in point. There, an award of actual and punitive damages was sustained in favor of an employee who was prevented from working because of threatening conduct by union pickets—activity which is also subject to restraint under Section 8(b)(1)(A) of the federal Act. The decision in *Russell* assumed that the Board might also make a back-pay award to the plaintiff employee (356 U.S. at 641), and thus shows that state authority “to award full compensatory damages for injuries caused by wrongful conduct” survives even though it may, to some extent duplicate a Board remedy in furtherance of the distinguishable “purpose of Congress to stop and to prevent unfair labor practices” (356 U.S. at 643). Although the fact of violence was featured more prominently in this opinion than in *Laburnum*, the decision nevertheless seems to be based on the *Laburnum* rationale rather than upon any exception for violence as such. The opinion commences with the question whether a state court has jurisdiction of a suit against the union for “malicious interference” with the plaintiff's lawful occupation (356 U.S. at 635), and repeatedly refers generally to “tort”, “common-law tort action”, “tort action”, “common law rights of action”, “tort remedy”, “tort damages”, “wrongful conduct”, and “tortious conduct”—without any limitation to violent conduct (356 U.S. at 635, 641, 642, 643, 644, 645, 646).

This trilogy of decisions—*Laburnum*, *Russell*, and *Gonzales*—establishes that coincidence of state law and

the Act's unfair labor-practice provisions does not preclude application of the former to the end that compensation in damages may be made available to redress private losses. The significant difference which justifies the coexistence of federal and state authority in this situation is the separate and non-conflicting purposes which each serves. The Board's remedial authority is designed to achieve "the elimination of industrial conflict," and is therefore exercised in vindication of the public right. *Virginia Electric Co. v. National Labor Relations Board*, 319 U.S. 533, 543. See also, *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 265. Accordingly, the Board does not redress private losses, no matter how justifiable the claim, except insofar as its orders may incidentally have that effect, to varying and uncalculated degrees; in their intended effectuation of the broader policies of the Act. *Russell*, 356 U.S. at 642-643, 645; *Laburnum*, 347 U.S. at 665. Recovery in damages for economic loss, on the other hand, does "not purport to remedy or regulate union conduct on the ground that it was designed to bring about \* \* \* the evil the Board is concerned to strike at as an unfair labor practice" (*Gonzales*, 356 U.S. at 622), but rather is intended to provide relief for traditional private interests which are not cognizable under the federal Act, and for which the Board can give no relief. Damages relate only to "tortious conduct already committed," not to the prevention of future conduct. *Laburnum*, 347 U.S. at 665. And since the remedies are totally different, there is no possibility of conflict

between the federal Board's authority and that of the state court. As this Court has emphasized, the "important distinction between the purposes of federal and state regulation" serves to circumscribe an allowable area for the independent operation of each. *Gonzales*, 356 U.S. at 622.<sup>1</sup>

2. In the view of those who uphold state jurisdiction, the arguments of the proponents of federal preemption (set forth *infra* in Part B, and in the dissenting opinion below) face insurmountable obstacles. Thus, it has been urged that to permit a state court to entertain a suit for damages for economic injury flowing from unfair labor practice conduct might result in the denial of federally protected rights. It cannot be gainsaid that the National Board and a state tribunal might arrive at different conclusions with respect to the legality of particular labor activity. But here, as in *Russell*, "the [California] tort remedy, as applied in this case," does not purport to alter "rights and duties affirmatively established by Congress." 356 U.S. at p. 643. The decision below is premised on the ground that the union conduct in the instant case is violative of both federal and state law. As noted above, picketing by a union in support of a demand for a union security agreement which, as here, does not satisfy the requirements of Section 8(a)(3) of the federal Act is violative of Section 8(b)(2). And it appears that, in this situation, the Board would probably have found the union's conduct violative of Sec-

<sup>1</sup> And see pp. 17-19, *supra*.

tion 8(b)(2).<sup>3</sup> In this frame of reference the state court has not sought to apply its own law without regard to applicable federal law and to rights protected thereunder. The instant case is therefore not at all one where "the state court would restrict the exercise of rights guaranteed by the Federal Acts." *Russell*, 356 U.S. at 644. On the contrary, the state court has given a remedy against action probably *prohibited* by the federal Act.

It also urged (R. 348) that "damages are a means of enforcing policy and controlling conduct, although somewhat less direct than an injunction" and that to permit the state to enforce its labor policy through the remedy of damages is potentially prejudicial to the careful accommodation Congress has made between the competing rights and interests of labor and management. But damages are awarded for past conduct whereas an injunction issues while the dispute is alive and active; hence, there is less likelihood that state power to grant damages, as distinguished from prospective injunctive relief, would tip the scales in the particular labor dispute, and thus endanger the delicate balance between the rights of employers, unions, and employees which the federal Act seeks to maintain. Accordingly, in the interest of preserving a viable federalism, Congress could well have left the states with power to award damages for past unfair labor practice conduct, even though this might, to some extent, introduce an element of non-uniformity in the

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<sup>3</sup> See, e.g., *Denver Bldg. Trade and Const. Trades Council*, 90 N.L.R.B. 1768, enforced, 192 F. 2d 577 (C.A. 10); *Medford Bldg. and Const. Trades Council*, 96 N.L.R.B. 165.

field of labor-management relations. The fact that Congress may have had this view is, indeed, specifically confirmed in Section 303 of the Labor-Management Relations Act, permitting private suits for damages with respect to conduct also constituting unfair labor practices under Section 8(b) (4) of the National Labor Relations Act.<sup>9</sup> Compare *United Brick & Clay Workers v. Deena Artware*, 198 F. 2d 637, 642-643 (C.A. 6), certiorari denied, 344 U.S. 897, with *National Labor Relations Board v. Deena Artware*, 198 F. 2d 645, 653 (C.A. 6), certiorari denied, 345 U.S. 906; see also *International Longshoremen's Union v. Juneau Spruce Corp.*, 342 U.S. 237, 243-244. This degree of dual occupancy of the field is but part of "the price we pay for our federalism, for having our people amenable to—as well as served and protected by—

<sup>9</sup> There is no room for the implication that Congress, by providing for federal district court jurisdiction to award damages in Section 8(b) (4) cases, intended to limit recovery of a damage judgment to that class of cases alone. The legislative history of Section 303 shows that it was proposed, not as the single instance in which damages should be allowed, but rather as a substitute for the proposal, which was rejected by the Senate, that employers be permitted to obtain injunctive relief against Section 8(b) (4) violations. See Legislative History of the Labor Management Relations Act (G.P.O., 1948), Vol. II, pp. 1346, 1365, 1369-1371, 1400. See also *Laburnum*, 347 U.S. at 665-666.

This Court, significantly, has declined to draw the analogous implication that, because a proposal in the House bill providing for recovery in damages for losses sustained as the result of "unlawful concerted activity" was rejected in conference, no such suits are allowable. See *Gonzales*, dissenting opinion, 356 U.S. at 630, commenting on H.R. 3020, 80th Cong., 1st Sess., p. 49, and H. Rep. No. 245, 80th Cong., 1st Sess., pp. 43-44.

The opposing arguments as to the significance here of Section 303 are stated in footnote 16, p. 35, *infra*.

two governments. \* \* \* Against it must be put what would be a greater price, that of sterilizing the power of both governments by not recognizing the autonomy of each within its proper sphere." *Knapp v. Schweitzer*, 357 U.S. 371, 380-381.

It has also been urged that the area reserved for state action with respect to controversies covered by the federal Act is restricted to cases in which the state applies traditional or "common law" tort doctrines, and not "labor relations" considerations in its tort actions. From what has already been said, it follows that whether there is a separate state interest which warrants state adjudication of conduct covered (or probably covered) by the Act does not turn on its classification under a rubric of labor policy or "common law" tort. It may well be, as this Court has noted (*Laburnum*, at 663-665; *Russell*, at 641-643), that the separate purpose of a damage award from that of a Labor Board remedial order is emphasized where the source of the law invoked by the state lies in traditional doctrines of general applicability. But the critical factor which underlies this Court's decisions in this field is that Congress, by its regulation of union conduct, has not cancelled out state power to vindicate the legitimate local interest in requiring compensation by unions which cause injury by violation of state law. Since a damage award entered pursuant to this power does not represent an effort to deal with the particular conduct for the regulative purposes provided for in the federal Act, it makes no difference whether the conduct is deemed wrongful by the state under its conventional tort law or on

labor relations grounds.<sup>10</sup> Just as a state is precluded from undertaking, on non-labor grounds, the same remedial task that is vested with the Board with respect to conduct covered by the Act (*Weber v. Anheuser-Busch*, 348 U.S. 468), it is not precluded from acting pursuant to its separate purposes in awarding money damages where the unlawfulness of the conduct is premised on state labor policy.<sup>11</sup>

The proponents of state jurisdiction thus argue that accommodation may be made between the continuing state interest in imposing money liability for injuries resulting from past wrongful acts and federal responsibility for the prevention of unfair labor practice conduct, thus supporting affirmance of the damage award in this case. As in *Laburnum*, *Russell*, and *Gonzales*, they argue that the damage judgment here represents compensation for a private economic injury, and not an attempt to prevent continuation of unfair labor practice conduct. In one significant re-

<sup>10</sup> In fact, the "common-law tort" on which the jury was instructed in *Laburnum* was that it was unlawful under a Kentucky statute for a union to coerce employees in the exercise of their rights to join or not to join labor unions (Record, No. 188, Oct. Term, 1953, pp. 1818-19). The "non-labor" aspects lay only in establishing the employer's right to recover for the interference with his business relationships caused by conduct thus made unlawful. In addition, as noted above (*supra*, pp. 19-20), most of the damages seem to have resulted primarily from a threatened secondary strike; clearly a matter of "labor relations".

<sup>11</sup> The proponents of state jurisdiction also deny, of course, that the *Laburnum* and *Russell* decisions are bottomed on, and restricted to, violent union conduct. See *supra*, pp. 18-21.

spect, the state award in this case is even more separate and distinct from the remedial scheme of the federal Act than the awards in *Russell* and *Gonzales*, for, unlike the situation in those cases, the Board is without authority here to duplicate in any manner the compensation awarded by the state.<sup>12</sup> Rather, as in *Laburnum*, the union in this case will achieve financial immunity for its wrongful conduct unless the state is entitled to impose liability; more than that, if the Labor Board refuses or fails to act, no sanction at all is available against the union, and unlawful conduct goes completely unremedied. In short, the opinions and decisions in *Laburnum*, *Russell*, and *Gonzales* appear to the proponents of state jurisdiction to control the instant case in favor of respondents.

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<sup>12</sup> The Court in *Garner* rejected the contention that, because the state was vindicating private rights and the Board only public rights, a state remedy for the conduct there involved could not conflict with the Board's regulation thereof (346 U.S. at 498-501). The context of the Court's remarks on this matter indicates that it was only considering the effect of a state injunctive remedy, which paralleled the remedy which the Board could provide, and not the effect of a state damage remedy, which had no parallel under the Act. Thus, the Court emphasized that (*Id.*, at 499): "It must be remembered that petitioners' state remedy was a suit for an injunction prohibiting the picketing. The federal Board, if it should find a violation of the national Labor Management Relations Act, would issue a cease-and-desist order and perhaps obtain a temporary injunction to preserve the *status quo*." Similarly, it added (*Id.*, at 500): "Our decisions dealing with injunctions have been much concerned with the existence and nature of private property rights, but no case is cited or recalled in which this Court has recognized the distinction between private and public rights to reach such consequences as are urged here." Accord: *Laburnum*, 347 U.S. at 665.

## B. THE CASE FOR FEDERAL PREEMPTION.

While recognizing the force of the arguments presented above, the proponents of the view that the federal Act precludes an award of damages for the union activities here involved argue that that Act's policy of uniformity precludes state court jurisdiction over any litigation which is based on charges of non-violent labor activities with which the national Act expressly deals, whether the remedy sought be an injunction or an award of damages. In their view, (1) the imminence of conflicting adjudications, contrary to the Congressional policy of uniformity, is present in any litigation in state tribunals when such litigation is based upon the same labor practice which is probably subject to regulation by the national Act, because factual and legal adjudications of the basic controversy must precede an award of damages or other remedy, no less than a grant of injunctive relief, and (2) all of the decisions of this Court which have upheld state jurisdiction over labor activities affecting commerce have been with respect either to activities involving violence and similar breaches of the peace or to activities with which the national Act does not expressly deal.

1. In this view, the basic reason underlying this Court's rulings of preclusion of state jurisdiction in the field of labor relations is that "Congress has expressed its judgment in favor of uniformity" of regulation of labor and industrial practices with which the national Act expressly deals (*Guss*, 353 U.S. at 10-11; *Fairlawn*, *id.* at 24; *Garner*, 346 U.S. at 488-491).

As the *Garner* decision points out, Congress evidently recognized that uniformity of regulation is not attained merely by prescribing "a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties," and that "a multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law" (346 U.S. 490-491). As *Garner* also pointed out, "when two separate remedies are brought to bear on the same activity" such conflicting adjudications are "imminent" (*id.* at 498-499). It was because of the imminence of such conflicts when "the State, through its courts, may adjudge the same controversy and extend its own form of relief" (see *id.* at 489), that this Court concluded in *Garner* that "the grievance was *not subject to litigation* in the tribunals of the State" (*id.* at 501; emphasis added). This, it is argued, is the only sound and realistic conclusion that can be reached with respect to the complex and delicate aspects of labor management relations which are expressly subjected to the national Act's regulation, if the basic policy of that Act to promote industrial peace by encouraging collective bargaining is not to be frustrated.

According to this view, the basic principle of the *Garner* decision is:—where "Congress has taken in hand this particular type of controversy" or "expressly placed [the matter] within the competence of the federal Board" (*id.* at 488, 491), the potentiality of conflict, if the same controversy were "subject to litigation in the tribunals of the State" (*id.*

at 501), is so possible that *any* litigation or adjudication of such controversies in state tribunals must be precluded, regardless of the form of relief or remedy sought. Adherence to this principle was indicated by the specific reminder in the *Fairlawn* opinion that "Congress did not leave it to state labor agencies, to state courts or to this Court to decide how consistent with federal policy state law must be," but that "[t]he power to make that decision in the first instance was given to the National Labor Relations Board, guided by the language of the proviso to § 10(a)" (353 U.S. at 24). And the *Fairlawn* opinion also explicitly pointed out that one of the reasons for the requirement of uniformity and the preclusion of state jurisdiction was the potentiality "that the outcome of proceedings before the National Board" might, in such a case, "have been entirely different from the outcome of the proceedings in the state courts, and that, therefore, "it cannot be said with certainty whether the state court's decree is consistent with the National Act" (*ibid.*).

This potentiality is present in any state court litigation or adjudication of controversies arising out of "conduct of which the National Act has taken hold" (*id.* at 23), regardless of the remedy or form of relief such litigation may entail. For an award of damages, no less than injunctive relief, depends upon a trial and adjudication of the basic controversy, and thus it is the process of litigation itself (regardless of the nature of the remedy) that produces the "diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies"

which frustrate the Congressional policy of uniformity (*Garner*, at 490).

In all cases of non-violent labor activities, findings of fact as to the exact nature and purpose of the conduct are basic to the determination as to whether the conduct is protected or prohibited by the federal Act. Such findings often involve a delicate balancing of employee, employer and public interests—considerations which are especially susceptible to the “incompatible or conflicting adjudications” which are “likely to result from a variety of local procedures and attitudes toward labor controversies” (see *Garner*, at 490–491). The Congressional purpose of uniformity would thus inevitably be frustrated and thrown into chaotic confusion, it is contended, if the multiple state courts were permitted to take jurisdiction over cases involving non-violent labor activities which are subject to the federal Act, and to make such findings of fact and award damages if they decide that the nature and purpose of the activities are unlawful under state law. The federal Board might find the nature and purpose of the activities to be different if the facts were presented to it.<sup>12</sup>

Whether particular non-violent conduct may be protected or prohibited by the federal Act is often a close and difficult question. This difficulty is demonstrated by *Capital Service, Inc. v. Labor Board*, 347 U.S. 501.

<sup>12</sup> Congressional concern with the determination of the facts to which the law will be applied is obvious from the requirement that, even in federal courts reviewing Board action, “The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive” (29 U.S.C. 160(e) (f)).

where the employer sought remedies both in the state court and before the National Labor Relations Board. The court enjoined certain peaceful activities as unlawful, while the Board found some of the activities enjoined by the court were protected. This Court upheld the Board's application for a federal court injunction against enforcement of the state court injunction.

In this case, the conduct in question is non-violent labor activities, which, if engaged in for any normal labor objective not proscribed by the Act, might be protected under Section 7 of the Act.<sup>14</sup> As this Court stated in *Garner*, and reaffirmed in *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, at 475, "it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing" except as the Act prohibits

<sup>14</sup> "[S]ection 7(a) is a uniform national policy established by law of Congress. As such, it must receive uniform interpretation everywhere \* \* \*." (Sen. Rep. No. 573, 74th Cong., 1st Sess., at p. 5.) That Congress did not intend to change this principle in enacting the 1947 amendments is evident from the report of the Senate Committee on Labor and Public Welfare on the bill which became the Taft-Hartley Act: "While the committee does not believe that social gains which industrial employees have received by reason of these statutes [the Norris-LaGuardia and Wagner Acts] should be impaired in any degree, we do feel that to the extent that such statutes, together with the regulations issued under them, and decisions regarding them, have produced specific types of injustice, or clear inequities between employers and employees, Congress should remedy the situation by precise and carefully drawn legislation. \* \* \* The committee bill is predicated upon our belief that a fair and equitable labor policy can best be achieved by equalizing existing laws in a manner which will encourage free collective bargaining." (Sen. Rep. No. 105, 80th Cong., 1st Sess., pp. 1-2.)

it." And it is for the Board to determine, in the first instance, whether the Act prohibits it.

Thus, this Court's expressed concern "lest one forum [the State] would enjoin, as illegal, conduct which the other forum [Federal] would find legal" (see *Automobile Workers v. Russell*, 356 U.S. 634, at 644), should not be limited to the injunction remedy. Realistically, damages may be equivalent to an injunction, in terms of interference with the national Act's policy and substantive rules.<sup>15</sup> As stated in the dissenting opinion below in the instant case (R. 348), "although

<sup>15</sup> "For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." (*Garner*, 346 U.S. at 499-500.)

The Senate Committee on Education and Labor, when favorably reporting the bill (S. 1958) which became the Wagner Act, stated:

"The \* \* \* unfair labor practices are designed not to impose limitations or restrictions upon the general guaranties of the Act, but rather to spell out with particularity some of the practices that have been most prevalent and most troublesome" (Sen. Rep. No. 573, 74th Cong., 1st Sess., at p. 9).

See also *Local 25, Teamsters Union v. New York, N.H. & H. R. Co.*, 350 U.S. 155, 161.

<sup>16</sup> The proponents for preemption also rely upon Section 303 of the Labor Management Relations Act, discussed *supra*, pp. 17-18, 25, fn. 9. They say that Congress, in providing for federal and state jurisdiction to award damages for secondary boycotts, made clear its intention that the damage remedy should not be available for other activities constituting unfair labor practices under the Act. If the grant of jurisdiction under Section 303 to "any other court having jurisdiction of the parties" is to have any meaning with reference to state court jurisdiction, an absence of jurisdiction for damages with respect to other unfair labor practices must be implied, they say, since the opposite construction renders the phrase surplusage.

somewhat less direct than an injunction" "damages are a means of enforcing policy and controlling conduct." The coercive effect of a large damage award, actual or potential, may well have the same consequences as an injunction. For that reason, the determination whether non-violent picketing is protected or prohibited must be removed entirely from the reach of state regulation, if the possibility of conflict condemned in *Garner* and the subsequent cases is to be avoided.

The problem of potentiality of conflict is particularly acute in any concurrent federal and state jurisdiction over controversies predicated on non-violent picketing activities, for this is a nebulous area "where the rulings of the Board are not wholly consistent" (see *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, at 481), and thus it cannot be said with any degree of certainty whether state action will be "consistent with the national Act" (see *Fairlawn, supra*, at 24). The instant case can be cited as a good illustration of the potential conflicts with, and impairment of, the national labor policy, for here the state law is different from the provisions in the national Act under which petitioners' conduct might be illegal, and the state court has now awarded damages without a Board determination of the legality or illegality of the conduct under the federal Act.

In sum, it is concluded by the proponents of preemption that to permit the award of money damages for the conduct here in question would establish in the state courts a broad jurisdiction, concurrent with that of the federal Board, to adjudicate unfair labor practices affecting commerce and dealt with expressly in

the federal Act. This concurrent jurisdiction would not be limited to cases, such as the instant one, in which the Board has declined to assert its jurisdiction; this Court has made clear in *Guss* and *Fairlawn*, and in its previous opinion in the instant case, that preemption principles apply to the full scope of the Act's coverage, whether or not the Board exercises its jurisdiction. If the authority of the state court to award damages in the present case is upheld, therefore, persons aggrieved by labor practices dealt with in the federal Act will seek the forum which they consider may be the more receptive to their views or will provide the relief which they consider most desirable. Also, in many situations, resort might be had to both the Board and the state courts with the two forums likely to make different adjudications of the same controversy. Any such concurrent jurisdiction "is fraught with potential conflict," *La Crosse Telephone Corp. v. Wisconsin Employment Relations Board*, 336 U.S. 18, 25; and to avoid such conflict state jurisdiction should be withheld. If it is not, a policy of diversity will take the place of the policy of uniformity contemplated by the federal Act; a multiplying variety of state actions, state rules, and state remedies will develop as an encrustation on the national policy.

2. The proponents of preemption also argue that all of the decisions of this Court which have upheld state jurisdiction over labor activities affecting interstate commerce have involved either violent conduct (or comparable breaches of the peace) or activities with which the federal Act does not expressly deal.

This Court in *Garner* recognized that the states may still exercise their "historic powers over such traditional local matters as public safety and order and the use of streets and highways" (346 U.S. at 488). Thus, where the conduct in question has involved violence or similar breaches of the peace, state litigation of the matter has been permitted whether the remedy sought was the preventive relief of an injunction or the award of damages for injuries arising from such conduct. *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740 (enjoined mass picketing, threats of bodily injury and property damage, obstruction of streets and public roads); *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (award to an employer of actual and punitive damages based on violent organizational conduct); *Auto Workers v. Wisconsin Board*, 351 U.S. 266 (enjoined violence and mass picketing); and *Automobile Workers v. Russell*, 356 U.S. 634 (award of actual and punitive damages in favor of an employee prevented from working by violent picketing). See also *Hotel Employees Union et al. v. Sax Enterprises, Inc., et al.*, Nos. 5 and 6, this Term, decided January 12, 1959 (no state jurisdiction to enjoin organizational picketing in the absence of violence).

The Court has also held that state courts were not precluded from litigating matters which are not subject to regulation by the federal Board or are too remotely related to the public interest expressed in the Taft-Hartley Act. *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336

U.S. 301 (regulation of maintenance-of-membership clause in contract, which was considered not to be sanctioned or forbidden by Act); and *Int'l Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (award of damages for loss of wages resulting from unlawful expulsion from union, a matter beyond the scope of the Act).

The three occasions on which this Court has upheld state damage judgments in the face of a contention that the principle of federal preemption precluded state action are thus distinguishable from the instant case—in the view of the supporters of preemption—for here the conduct alleged involves activity which is both non-violent and expressly subject to the national Act.

*Gonzales, supra*, involved the rights of a union member vis-à-vis his union, a matter with which the Act clearly does not deal. This Court proceeded upon the theory that (356 U.S. at 620) “the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. The proviso to section 8(b)(1) of the Act states that ‘this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein \* \* \*’ 61 Stat. 141, 29 U.S.C. § 158(b)(1).”

In *Laburnum* and *Russell, supra*, it is argued, violence was the gist of the wrongs involved and the basis for permitting the exercise of state jurisdiction. The importance of the violence is shown, it is contended,

by the following statement of the Court in *Russell* (356 U.S. at 640):

At the outset, we note that the union's activity in this case clearly was not protected by federal law. Indeed the strike was conducted in such a manner that it could have been enjoined by Alabama courts. *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131; *Auto Workers v. Wisconsin Board*, 351 U.S. 266.

And elsewhere in the opinion, the Court refers to the violent nature of the conduct, both in restating the *Laburnum* case (356 U.S. at 640), and in stating that (356 U.S. at 645):

If the employee's common-law rights of action against a union tortfeasor are to be cut off, that would in effect grant to unions a substantial immunity from the *consequences of mass picketing or coercion such as was employed during the strike in the present case*. [Emphasis added.]

See also the Court's analogy to the overturning of *Russell's* car, clearly a violent act (356 U.S. at 645-646). True, the opinion refers repeatedly to "common-law rights of action" and "tortious conduct" (see *supra*, p. 21), but it is also careful to refer to "the kind of conduct here involved" (356 U.S. at 641-642), "conduct such as is involved in the present case" (356 U.S. at 642), "damages caused him by this kind of tortious conduct" (356 U.S. at 646), "exercise of the police power of a State over such a case as this" (356 U.S. at 646). Each of these repeated qualifica-

tions, tying the Court's holding to a case "such as this", points to the violent conduct clearly involved in *Russell*.

As for the *Laburnum* opinion, it indicates that the question as to which the Court granted certiorari involved state jurisdiction over the "type of conduct" found by the Virginia court (347 U.S. at 658), and then it describes that "type of conduct" as involving violence (347 U.S. at 659-660). The legislative history it cites refers to violence and the possibility for "two remedies for an act of that kind" (347 U.S. at 668-669, emphasis in Court's opinion).<sup>17</sup> And the opinion's closing paragraph states that, unless the state courts have jurisdiction, "the offenders, by coercion of the type found here, may destroy property without liability for the damage done" (347 U.S. 669, emphasis added). In opinions subsequent to *Laburnum*, the Court has repeatedly referred to it as involving violence. See *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 477, 480; *United States v. Green*, 350 U.S. 415, 420; *Auto Workers v. Wisconsin Board*, 351 U.S. 266, 272, 274; *San Diego Unions v. Garmon*, 353 U.S. 26, 29 (the present case when it was here before); *Automobile Workers v. Russell*, 356 U.S. 634, 640.<sup>18</sup>

When activities within the purview of the Act are carried on in such a manner as to permit the state to take hold of them, the state can not only award dam-

<sup>17</sup> These excerpts from the legislative materials appear to be the only ones referring to concurrent state and federal remedies.

<sup>18</sup> *Int'l Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 621, refers to *Laburnum* as holding that "certain" state causes of action sounding in tort are not displaced.

ages as in *Laburnum* and *Russell* but can enjoin these activities. *Youngdahl v. Rainfair, supra*; *Auto Workers v. Wisconsin Board, supra*. But for the violence involved in these latter cases, *Garner* would have precluded state action to enjoin the activity which, in each case, constituted a federal unfair labor practice. Absent violence, this Court has already ruled in this case that the state court could not enjoin the union activity.

On this view, none of this Court's decisions stands in the way of a reversal of the court below, and such reversal is supported by the basic rule announced in the *Garner* case and applied in the many cases following it.

#### CONCLUSION

As indicated at the outset of this brief, the question presented is difficult, with the opposing contentions rather evenly balanced. We have endeavored to set forth fairly the principal arguments on both sides. In our view, the decisions of the Court in this field, particularly the *Laburnum* and *Russell* opinions, lend affirmative support to state jurisdiction here. Accordingly, we submit that the judgment of the Supreme Court of California should be affirmed.

Respectfully submitted.

J. LEE RANKIN,  
Solicitor General.

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